

NOTICE OF PROPOSED AMENDMENT AND ADOPTION OF REGULATIONS BY THE STATE  
LABOR COMMISSIONER TO IMPLEMENT THE PROVISIONS OF AB 633 AND OTHER STATUTES  
GOVERNING ENFORCEMENT OF MINIMUM WAGE AND OVERTIME REQUIREMENTS IN THE  
GARMENT INDUSTRY, AND THE REGISTRATION OF PERSONS ENGAGED IN GARMENT  
MANUFACTURING

INITIAL STATEMENT OF REASONS

The Labor Commissioner of the State of California ("Commissioner") proposes to amend and adopt regulations to implement and interpret the provisions of AB 633 (Stats. 1999, Chapter 554) and other statutes (Division 2, Part 11, Chapters 1 and 2 of the Labor Code, commencing with section 2670) governing the enforcement of minimum wage and overtime requirements in the garment industry, and the registration of persons engaged in garment manufacturing. The Commissioner proposes to amend certain regulations related to garment manufacturing (Title 8, California Code of Regulations, Division 1, Chapter 6, Subchapter 8, sections 13630-13654), and to adopt certain new regulations necessitated by AB 633 (included within the above-referenced subchapter, sections 13655-13659).

PROBLEMS ADDRESSED BY THE PROPOSED ACTION

The Commissioner is responsible for enforcing laws governing the payment of minimum wages, overtime, and other compensation, including laws specific to the garment industry. These laws are enforced through the Commissioner's exercise of quasi-adjudicatory authority to hold hearings and issue decisions on employee claims for unpaid wages, penalties, and other amounts owed by an employer; through the Commissioner's exercise of prosecutorial authority to conduct investigations and prosecute court actions for unpaid wages, penalties, and other amounts owed to employees; and in the garment industry, through the Commissioner's authority to issue or revoke or suspend certificates of registration to garment contractors or manufacturers engaged in garment manufacturing. The existing regulations were adopted during the 1980's to implement the statutes then in effect dealing with labor law enforcement and registration requirements in the garment industry.

In 1999, in response to widely publicized reports of ongoing abuses in the garment industry, the Legislature enacted AB 633, which substantially revised the existing laws governing garment manufacturing. The primary change brought about by AB 633 was the creation of a "wage guarantee," under which garment manufacturers are now liable for guaranteeing payment of minimum wages and overtime compensation to employees of their contractors. A manufacturer's liability for the wage guarantee is limited to its proportionate share of the work performed at a contractor's worksite during the pay period(s) in which minimum wages and overtime compensation are owed. However, AB 633 did not establish any new record keeping requirements, and the various recordkeeping obligations on the part of garment manufacturers and contractors pre-dated the enactment of AB 633 are insufficient to enable the Commissioner to make determinations as to a manufacturer's proportionate share of liability for the wage guarantee. Nor did AB 633 set out any methodologies for determining proportionality with respect to the manufacturer's wage

guarantee. These proposed regulations address these gaps in AB 633, by defining the methodologies that may be used by the Commissioner to determine proportionality, and by creating certain new record keeping requirements to enable the Commissioner, using these methodologies, to determine the identity and proportionate liability of any manufacturers for unpaid minimum and overtime wages owed to the employees of a garment contractor.

AB 633 also established a claims procedure by which an aggrieved employee may enforce a claim for unpaid wages against a garment contractor and the manufacturer(s) contracting with the contractor. This procedure, though based upon the wage adjudication process set out at Labor Code section 98 that governs all other wage claims heard by the Commissioner, contains certain provisions that differ from the general wage adjudication process. Under AB 633, the Commissioner is mandated to commence an investigation of the wage claim within ten business days after the claim is filed, and to complete this investigation, and present the investigator's findings as to the amount of wages owed, and the identity and proportionate liability of any guarantor(s) at a "meet-and-confer" conference, held within 60 days of the date the claim is filed. Failure to resolve this case at the meet-and-confer conference will result in the claim being scheduled for a section 98 wage adjudication hearing, and subjects the contractor and manufacturer(s) to liability for the claimant's attorney's fees if the claimant prevails in this hearing. Following this hearing, in order to file a de novo court appeal from the Commissioner's decision, the contractor or manufacturer(s) must post a bond with the Commissioner (rather than with the court, as in other all other employer appeals of wage adjudication hearings) in an amount equal to one and a half times the Commissioner's award. These proposed regulations are designed to implement and interpret these unique statutory provisions by clarifying the nature of the amounts that must be included in the investigator's findings and in the Commissioner's decision following a hearing, and the basis upon which attorney's fees (both as to liability and amount) are determined. The proposed regulations also establish the procedure to be followed for depositing an appeal bond with the Commissioner, which includes a written acknowledgment of the posting of the bond so as to enable the contractor or manufacturer to thereafter file an appeal with the appropriate court.

AB 633 also increased the annual registration fee for businesses engaged in garment manufacturing, creating a minimum fee of \$250 for both contractors and manufacturers, and a maximum fee of \$1,000 for contractors and \$2,500 for manufacturers, with the exact amounts payable by each applicant to be determined by the Commissioner, and "based on the applicant's annual volume," so that when aggregated, the collected fees would be sufficient to recover the Commissioner's costs of administration of the laws governing garment manufacturing. The proposed regulations define the term "annual volume" as gross sales receipts, and establishes a fee scale, within the statutory range, to ensure that based on the anticipated number of registrants at each level of the scale, the Commissioner will collect sufficient amounts to defray the costs of administering the garment manufacturing laws.

AB 633 defines "garment manufacturing," to include both the performance of garment manufacturing operations (such as sewing, cutting, finishing, or assembling garments) and the act of contracting to have those operations performed. AB 633 further defines "contractors" as persons who are primarily engaged in the performance of garment manufacturing operations. AB 633 does not contain an express definition of a "manufacturer." Under AB 633, all persons engaged in "garment manufacturing" must be registered, and manufacturers are subject to a higher registration fee than contractors. In order to clarify who is a manufacturer, both for purposes of determining the amount of the registration fee and for determining liability for the wage guarantee, these proposed regulations define "manufacturers" as persons who are engaged in "garment manufacturing," within the meaning of the law, but who are not contractors.

Since 1981, provisions in the Labor Code have prohibited the Commissioner from granting any application for registration unless the Commissioner, after investigation, is satisfied as to the applicant's character, competency and responsibility. Furthermore, the Commissioner is authorized to revoke any registration for

good cause. AB 633 expressly provides that the Commissioner may revoke the registration of any registrant that fails to timely pay a final award of unpaid wages. The existing regulations do not adequately set out the procedures for revocation hearings, and fail to set out any procedures for hearings on the denial of an application. The proposed regulations set out a detailed procedure that is modeled after provisions in the Government Code designed to ensure adequate due process, for the initiation and conduct of hearings to deny an application or to revoke or suspend a registration. The proposed regulations also expand on the sort of information that an applicant for registration must provide to the Commissioner, to ensure that the Commissioner has the necessary information to determine whether the applicant has the requisite character, competency and responsibility.

Finally, AB 633 gives the Commissioner the authority to enforce the wage guarantee with or without a claim having been filed by any employee, by authorizing the Commissioner to conduct investigations as to whether garment workers are being paid the minimum wage and required overtime compensation, and to file civil actions to enforce the wage guarantee. However, prior to filing such a civil action under AB 633, the Commissioner must provide each guarantor and employee with notice of the Commissioner's investigation and findings, an opportunity for a meet-and-confer conference, and an opportunity for a hearing. The proposed regulations establish the procedures that the Commissioner must follow prior to the filing of a civil action to enforce the wage guarantee.

#### SPECIFIC PURPOSE OF THE PROPOSED REGULATIONS

The purpose of the amendment to section 13630 is that the existing regulation, which defines "garment manufacturer" to include contractors or subcontractors, conflicts with AB 633 in that the "wage guarantee," set out at Labor Code section 2673.1, holds manufacturers (any person "engaged in garment manufacturing as defined in Section 2671, who contracts with another person for the performance of garment manufacturing operations") liable for the unpaid minimum wages and overtime compensation owed to their contractors' employees. Labor Code section 2671(d) now defines contractors as persons who, with the assistance of employees or others, are primarily engaged in garment manufacturing operations. Thus, for the wage guarantee to make any sense, garment manufacturers must now be defined as entities that are separate and distinct from contractors. As amended, section 13630 provides that both garment manufacturers and contractors are engaged in "garment manufacturing," as defined at Labor Code section 2671(b), in that "garment manufacturing" includes both the performance of various manufacturing operations (sewing, cutting, making, processing, assembling, etc.) *and* "contracting to have those operations performed." Thus, a garment manufacturer is now defined as a person who is "engaged in garment manufacturing," but who is not a "contractor," within the meaning of Section 2671(d). The reason and necessity for this amendment is to spell out exactly who is subject to the registration requirements of the law, how such persons "engaged in garment manufacturing" should designate themselves on an application for registration, and that despite any such designation, evidence may be introduced at a proceeding before the Commissioner on the person's actual business practices, so as to enable the Commissioner to determine, based on evidence in any proceeding, whether a person is a garment contractor or manufacturer for purposes of enforcing the wage guarantee.

The purpose of the amendment to section 13631 is that the existing regulation dealing with recordkeeping requirements fails to specify certain records that are required to be kept by other provisions of law, so as to create confusion on the part of employers as to the extent of their recordkeeping obligations. The reason and necessity for this amendment is to clearly apprise employers of what records must be kept, that such records must be made available to the Commissioner upon request for inspection and copying, and that failure to provide these records to the Commissioner following such request, or providing falsified records, shall constitute grounds for revocation of registration or denial of an application for registration. This is necessitated by the failure of many employers in the garment industry to keep required records, the fact that

these records are essential to enforcing wage and hour requirements, and the unwillingness of many garment industry employers to provide such records to the Commissioner without a court order enforcing a subpoena.

The purpose of the amendment to section 13632 is that the existing regulation establishing an advisory committee fails to specify the role of the committee, requires (rather than permits) the committee to authorize the Division of Labor Standards Enforcement (henceforth, "the Division") to publish a report on industry practices and patterns of violations, and specifies that the report be prepared by a particular program within the Division that no longer exists. The reason and necessity for the amendment is to clarify the role of the committee, and to give the committee the discretion as to whether or not to authorize the Division prepare any report.

The purpose of the amendment to section 13633 is that the existing regulation is duplicative of existing law, in that it does nothing more than require every garment manufacturer to register with the Commissioner, a requirement found at Labor Code section 2675(a) ["every person engaged in the business of garment manufacturing shall register with the commissioner."] The proposed amendment is declaratory and intended to clarify existing law and regulations. The proposed amendment also addresses the particular enforcement problems posed by employee leasing companies and temporary agencies, which provide manufacturers or contractors with the services of employees engaged in garment manufacturing operations. These leasing companies and the businesses to whom they lease employees are joint employers as a matter of law for wage and hour purposes, and because the leasing company is a joint employer of garment workers, it is "engaged in the business of garment manufacturing" so as to be subject to the statutory requirement that it register with the Commissioner, and subject to the existing regulatory requirement that it notify the Commissioner of any changes in address. For enforcement purposes, the location where garment manufacturing operations are performed (i.e., the location where the leased employees are working) is as critical as the office address of the leasing company. The regulation would require leasing companies and temporary agencies that provide leased employees to persons engaged in garment manufacturing to register as contractors, and to provide the Commissioner with notice whenever it enters into or terminates an arrangement to lease employees to a garment manufacturer or contractor. The reason and necessity for this regulation is to enable the Commissioner to enforce laws relating to garment manufacturing, including the requirement to pay minimum wages and overtime, on behalf of leased employees.

The purpose of the amendment to section 13634 is that the existing regulation, which sets out the information that must be provided by an applicant for registration as a garment manufacturer or contractor, does not require certain information that is now critical for enforcing the wage guarantee at Labor Code section 2673.1, and successor liability under Labor Code section 2684, for establishing the amount of registration fees that the applicant must pay, and for enabling the Commissioner to determine whether the applicant possesses the requisite character, competency and responsibility to be registered as a garment manufacturer or contractor. The information required by this proposed regulation would have to be listed on the application for registration. The reason and necessity for this regulation is that without the specified information, the Commissioner would lack information that is needed to carry out his or her licensing function.

The purpose of the amendment to section 13635 is that the existing regulation specifies the amount that was charged for registration fees prior to AB 633. With AB 633's amendment of Labor Code section 2675, registration fees have increased to a range that now runs from \$250 to \$1,000 for contractors, and from \$250 to \$2,500 for manufacturers, with the exact amount to be determined by the registrant's "annual volume" so that the total amount collected by the Commissioner is sufficient to defray the costs of administering the laws governing garment manufacturing. The reason and necessity for the amendment of this regulation is that without the amendment, the regulation would not be consistent with the statute. The proposed amendment establishes a fee scale, within the statutory range, so that each garment manufacturer or

contractor will pay a registration fee that is tied to the registrant's annual gross receipts, with the amounts set based on the numbers of registrants likely to fall within each fee level, so as to ensure that a sufficient total amount will be collected. Under the proposed amendment, applicants who have had their registrations revoked or suspended, or who have had an application denied within the past three years, will generally pay a higher registration fee than other applicants, as a consequence of the higher administration costs resulting from these licensing proceedings.

The purpose of the adoption of section 13653.1 is that the existing regulations do not contain any of the provisions that are required under Government Code sections 15374-15378. The proposed regulation is designed to comply with the requirements of the Permit Reform Act.

The reason and necessity of this regulation is that all state agencies that issue licenses or registrations must comply with the provisions of the Permit Reform Act.

Existing section 13636 is not amended by these proposed regulations.

The purpose of the amendment to section 13537 is that the existing regulation compels the Commissioner to issue an amended registration certificate to any registrant immediately upon receipt of notice of a change of address. The proposed amendment requires the registrant to provide the Commissioner with two weeks advance notice, and authorizes the Commissioner to refuse to issue an amended registration certificate if the registrant is not currently registered, or if the Commissioner determines that garment manufacturing cannot legally or safely be carried on at the new premises. The reason and necessity for the amendment is to give the Commissioner discretion, when appropriate, to refuse to issue an amended registration certificate.

Existing section 13638 is not amended in any significant way by these proposed regulations.

Existing section 13639 is not amended in any significant way by these proposed regulations.

Existing section 13640 is not amended in any significant way by these proposed regulations.

The purpose of the amendment to section 13641 is that the existing regulation, which sets out the method for determining the amount of the bond required as a condition for continued registration following the commission of certain violations, fails to specify that a licensed surety must issue the bond. The reason and necessity for the proposed amendment is to specify that a licensed surety must issue a bond, and that an undertaking (authorized under section 13644 of the existing regulations) may be posted in lieu of a bond.

The purpose of the amendment to section 13642 is that under the existing regulation, a bond posted as a condition of continued registration must be returned if the employer does not commit any further violations within a two-year period. The reason and necessity for the proposed amendment is to extend the time during which a registration bond or undertaking will be held by the Commissioner to three years, after which it will be returned if no further violations were committed during that three year period. Keeping the bond or undertaking for an extra year provides a source of recovery in the event of additional wage violations.

The purpose of the amendment to section 13643 is that under the existing regulation, the Commissioner is authorized to recover wages against a registration bond if the bonded employer "is unable to pay wages." An employer's purported inability to pay does not excuse the employer from its legal obligations. The reason and necessity for the proposed amendment is to correct what was undoubtedly a drafting error in the regulation, so as to authorize the Commissioner to proceed against a registration bond or undertaking, and recover unpaid wages, if an employer fails to pay wages that are owed.



The purpose of the amendment to section 13644 is that the subject of the existing regulation, the posting of an undertaking in lieu of a registration bond, is dealt with in section 13641 in the proposed regulations. The proposed section 13644 sets out the procedures for the posting of a bond or undertaking with the Commissioner, as now required by Labor Code section 2673.1(g), as a precondition for the filing, by the contractor or manufacturer, of a de novo appeal of the Commissioner's order, decision or award following a wage adjudication hearing. The conditions on the bond or undertaking are based on those set out at Labor Code section 98.2(b), a statute that applies to all de novo appeals of wage claims other than those arising under AB 633. The salient differences between sections 98.2(b) and 2673.1(g) is that under the former, the bond or undertaking must equal the Commissioner's award and must be posted with the court, while under the latter, the bond or undertaking must equal 150% of the Commissioner's award, and must be posted with the Commissioner as a precondition for filing the appeal with the court. The proposed amendment to section 13644 also provides for written notice from the Commissioner to the contractor or manufacturer confirming that the appeal bond or undertaking

has been posted, so as to enable the contractor or manufacturer to advise the court that this prerequisite to filing an appeal has been satisfied, and that no additional appeal bond is required. The reason and necessity for this amendment to the regulation is that these procedures are needed to implement AB 633's special appeal bond requirement.

The purpose of the amendment to section 13645 is that the existing regulation provides for certain periods of revocation of registration based on the nature of the contractor's or manufacturer's violations, without specifying that such contractor or manufacturer is only entitled to register after the expiration of the revocation if any judgments or settlement agreements for the payment of wages have been satisfied. The proposed amendment precludes registration following expiration of a revocation unless such judgments and settlement agreements have been satisfied. The reason and necessity for this amendment is to encourage the payment of judgments and settlement agreements for recovery of unpaid wages.

The purpose of the amendment to section 13646 is that the existing regulation does not adequately set out the procedures for revocation hearings, and fails to set out any procedures for hearings on the denial of an application. The proposed regulation sets out a detailed procedure that is modeled after provisions in the Government Code designed to ensure adequate due process, for the initiation and conduct of hearings to deny an application or to revoke or suspend a registration. As a matter of practice, the Commissioner has followed these provisions even though not required under the existing regulation to do so. The reason and necessity for the amendment of this regulation is that a regulation that expressly spells out the hearing procedures that will be followed is preferable to a regulation that is, at best, vague and ambiguous.

The purpose of the amendment to section 13647 is that the existing regulation uses the term garment manufacturer to mean both manufacturers and contractors, and fails to list certain statutes under which a garment manufacturer or contractor may be found liable for unpaid wages or penalties. The existing regulation allows for the filing of an application for registration following the expiration of any period of revocation, provided the applicant has satisfied liabilities arising under Labor Code section 2679(b), which concerns minimum wage, overtime, and child labor violations. But these violations may also give rise to liability under Labor Code sections 2673.1, 2677, and 2678. The reason and necessity for the amendment of this regulation is to include garment contractors within its scope, and to include the various other Labor Code sections which, when serving as the basis for liability for unpaid wages or penalties, should preclude the granting of a new registration following the expiration of a revocation period unless the applicant has satisfied these liabilities.

The purpose of the amendment to section 13648 is that the existing regulation, which deals with the

procedures that must be followed by the Commissioner in carrying out a confiscation under Labor Code sections 2679 and 2680, only deal with confiscations of garments, and do not address confiscations of "the contractor's means of production," an enforcement tool added by AB 633 at section 2680(b). The proposed amendment specifies the procedures for notice and hearing following a confiscation of the contractor's means of production pursuant to Labor Code section 2680(b). The reason and necessity for the amendment of this regulation is that in order to ensure the constitutionality of any such confiscation, the contractor and any other person with a known ownership interest in the confiscated property must get notice and the right to a hearing, in much the same manner as the existing regulation provides for similar notice and hearing rights following the confiscation of garments

The purpose of the amendment to section 13649 is that the existing regulation, which sets out procedures for the disposition of confiscated garments, fails to address the disposition of confiscated manufacturing equipment, now authorized by AB 633 at Labor Code section 2680(b). Also, the existing regulation, which permits the release of confiscated garments to certain nonprofit organizations, fails to specify that the nonprofit organization receiving confiscated garments must make the garments available to needy or impoverished persons, and fails to prohibit the nonprofit organization from subsequently selling the garments or giving the garments to a for profit business (including, for example, the manufacturer that contracted to have the garments made, or the contractor that made the confiscated garments). The reason and necessity for the amendment of this regulation is to establish procedures governing the disposition of confiscated manufacturing equipment, and to close a loophole in the existing regulation that could be used as a subterfuge to return confiscated garments to the party or parties from whom the garments were confiscated.

The purpose of the adoption of section 13650 is that the existing regulations do not clearly state that the hearing procedures set out at sections 13651-13654 apply to hearings held pursuant to Labor Code section 2681 on appeals of garment penalty assessments or confiscations of garments or other property. The reason and necessity for the adoption of this regulation is to make clear that these types of appeal hearings are to follow the procedures set out at sections 13651-13654.

The purpose of the amendment of section 13651 is that the existing regulation, which allows for the admission of virtually all relevant evidence, fails to make an exception for evidence that is subject to the rules of privilege. The proposed amendment gives effect to the rules of privilege. The reason and necessity for the amendment of this regulation is to ensure against compulsory divulgence of privileged evidence.

The purpose of the amendment of section 13652 is that the existing regulation, which deals with taking evidence at hearings, is silent on the procedures for recording the hearing. These hearings are reviewable by writ of mandate, so recordation and/or transcription is essential. The reason and necessity for the amendment is to establish a requirement that the hearings be electronically recorded, or alternatively, transcribed by a court reporter if certain conditions are met.

Existing section 13653 is not amended by these proposed regulations.

The purpose of the amendment of section 13654 is that the existing regulation, which deals with the issuance of subpoenas, is to some degree inconsistent with the provisions on subpoenas found at Government Code sections 11450.05-11450.50. The reason and necessity for the amendment is to adopt these Government Code sections as the controlling authority on subpoenas and subpoenas duces tecum.

The purpose of the adoption of section 13655 is the necessity for defining the methodologies that may be used for determining each manufacturer's proportionate share of liability for the wage guarantee when a contractor performs garment manufacturing operations for more than one manufacturer. The primary change brought about by AB 633 was the creation of a "wage guarantee," under which garment manufacturers are

now liable for guaranteeing payment of minimum wages and overtime compensation to employees of their contractors. A manufacturer's liability for the wage guarantee is limited to its proportionate share of the work performed at a contractor's worksite during the pay period in which minimum wages and overtime compensation are owed. However, the statute does not specify any methodologies for determining proportionate share. This proposed regulation defines the methodologies that may be used by the Commissioner to determine proportionality, and would allow the Commissioner to base proportionality on available evidence of the contractor's gross sales, the contractor's employees' hours worked, or the number of garments produced by the contractors' employees. Other provisions of the laws applicable to garment manufacturing, and these proposed regulations, establish record keeping requirements that should enable the Commissioner to make determinations on proportionality on the basis of required records. The proposed regulation allows the Commissioner, in the absence of required records, to rely on testimony as a means of determining proportionality, and if such testimony is insufficient to allow the Commissioner to reach a determination, the Commissioner must then equally apportion the full amount of the claim for unpaid minimum wages and overtime amongst the known guarantors. The reason and necessity for this regulation is that in order to implement AB 633's wage guarantee, these regulations must establish methodologies for determining each manufacturer's proportionate share of liability.

The purpose of the adoption of section 13656 is to clarify exactly what amounts (e.g., unpaid minimum wages, unpaid overtime wages, liquidated damages, etc.) should be listed on the findings and assessment of wages owed prepared by the Commissioner's investigator pursuant to Labor Code section 2673.1(d)(3), and on the Commissioner's order, decision or award following an adjudicative hearing pursuant to section 2673.1(d)(5). The proposed regulation breaks down the amounts by category, and tracks the applicable statutes to show which categories apply to contractors and which apply to guarantors. The reason and necessity for this regulation is to aid the Commissioner's investigators and hearing officers, and outside parties including garment workers, contractors and guarantors, in understanding exactly what categories of relief are available from contractors and guarantors through the AB 633 meet-and-confer and hearing process.

The purpose of the adoption of section 13657 is threefold: first, to define when a wage claimant is a "prevailing party" for the purpose of awarding attorney's fees at a wage adjudication hearing if the claim was not settled at the meet-and-confer conference, second; to establish the methodology for determining the amount of fees awarded, and third; to establish the procedure whereby the claimant may seek attorney's fees. Labor Code section 2673.1(f) provides for an award of reasonable attorney's fees if the contractor or guarantor refuses to pay the amount found due by the Commissioner's investigator, thereby necessitating a wage adjudication hearing, and the employee prevails at the hearing. Under these circumstances, the proposed regulation defines the employee as the prevailing party if, following the hearing, the Commissioner issues a decision awarding any amount to the employee. Labor Code section 2673.1(f) also provides for an award of reasonable attorney's fees if the employee rejects the findings of the Commissioner's investigator, and thereafter, prevails at the hearing. Under these circumstances, the proposed regulation defines the employee as the prevailing party if, following the hearing, the Commissioner issues a decision awarding more to the employee than the amount found due by the Commissioner's investigator *and* posted by the guarantor(s) or contractor, for full, immediate, and unconditional payment to the employee, no later than the conclusion of the meet-and-confer conference. Unless the full amount found due by the investigator is posted with the Commissioner prior to the conclusion of the meet-and-confer conference for immediate and unconditional payment to the employee regardless of the outcome of the hearing, the employee will be considered to have prevailed at the hearing if there is any net recovery in favor of the employee. The proposed regulation adopts a methodology for determining the amount of fees owed based on the reasonable hours expended on the case multiplied by a reasonable rate for the legal work performed. Finally, the proposed regulation sets out the procedure by which attorney's fees can be claimed, contested and determined. The reason and necessity for this regulation is that in order to implement the attorney's fees



provisions of AB 633, the Commissioner must establish rules for determining what factors make a claimant a prevailing party for the purpose of entitlement to fees, what factors must be considered for determining the amount of fees owed, and what procedures must be followed for claiming fees.

The purpose of the adoption of section 13658 is to establish the procedures that the Commissioner must follow prior to the filing of a civil action to enforce the wage guarantee. Labor Code section 2673.1(j) gives the Commissioner the authority to enforce the wage guarantee with or without a claim having been filed by any employee, by authorizing the Commissioner to conduct investigations as to whether garment workers are being paid the minimum wage and required overtime compensation, and to file civil actions to enforce the wage guarantee. However, prior to filing such a civil action, the Commissioner must provide each guarantor and employee with notice of the Commissioner's investigation and findings, an opportunity for a meet-and-confer conference, and an opportunity for a hearing. The reason and necessity for the proposed regulation is to set forth the procedures that the Commissioner must follow in this pre-litigation/investigation phase prior to the filing of a civil action.

The purpose of the adoption of section 13659 is to create certain new record keeping requirements on the part of garment contractors and manufacturers to enable the Commissioner, to determine the identity and proportionate liability of any manufacturers for unpaid minimum and overtime wages owed to the employees of a garment contractor. Labor Code section 2673.1(a), the heart of AB 633, establishes a "wage guarantee," under which garment manufacturers are now liable for guaranteeing payment of minimum wages and overtime compensation to employees of their contractors. A manufacturer's liability for the wage guarantee is limited to its proportionate share of the work performed at a contractor's worksite during the pay period in which minimum wages and overtime compensation are owed. However, AB 633 did not establish any new record keeping requirements, and the various recordkeeping obligations on the part of garment manufacturers and contractors pre-dated the enactment of AB 633 are insufficient to enable the Commissioner to make determinations as to a manufacturer's proportionate share of liability for the wage guarantee. The reason and necessity for the proposed regulation is that records must be kept and made available that would allow the Commissioner to use the various methodologies for determining proportionality, which are set out elsewhere in these regulations. In order to enforce the proportional liability aspect of the wage guarantee, records are needed that would show the identity of the manufacturer, the amounts earned by the contractor, and the number of garments manufactured as to each contract to perform garment manufacturing operations for a manufacturer; and that would identify each manufacturer for whom the contractor's employees performed garment manufacturing operations, and specify the percentage of each employee's total worktime during each pay period during which the employee performed garment manufacturing operations for each identified manufacturer. This regulation requires employers engaged in garment manufacturing to keep such records, in the form of written contracts between garment contractors and manufacturers, and to make those contracts available to the Commissioner. This regulation also requires contractors to provide their employees with the names of the manufacturer(s) for whom the contractor performed any garment manufacturing operations during each pay period, and the percentage of worktime that was spent performing such operations for each manufacturer if more than one manufacturer is named, with this information to be included on the written itemized wage earning and deduction statement that must be provided to each employee every time wages are paid pursuant to Labor Code section 226. Absent the written records required by this regulation, enforcement of AB 633's proportionate liability provisions would be difficult at best, and in many cases, impossible.

#### TECHNICAL, THEORETICAL, AND/OR EMPIRICAL STUDIES, REPORTS OR DOCUMENTS

The Commissioner did not rely on any technical, theoretical, or empirical study, report or similar document

in proposing the amendment and adoption of these regulations, except that the Commissioner undertook a survey of registered garment manufacturers and contractors in April 2001 to ascertain each registrant's gross annual sales, so as to enable the Commissioner to establish a scale within the range of registration fees prescribed by AB 633 (\$250 to \$1,000 for contractors, and \$250 to \$2,500 for manufacturers, with the exact amount charged to an applicant to be based on the applicant's "annual volume") to ensure, as required by statute, that the fees collected will be sufficient to defray the Commissioner's costs of administering the laws governing garment manufacturing.

## ALTERNATIVES TO THE REGULATIONS CONSIDERED BY THE AGENCY AND THE AGENCY'S REASONS FOR REJECTING THOSE ALTERNATIVES

Alternatives were considered with respect to certain proposed regulations; namely, section 13630 and section 13657. Both garment worker advocate groups and representatives of garment manufacturers and retailers proposed alternative versions of section 13630, which would have provided extremely detailed definitions of what activities constitute "garment manufacturing" for the purpose of determining whether a person is a contractor, a garment manufacturer, or not engaged in garment manufacturing in any capacity. The problem with both the worker advocates' suggestions and the manufacturers/retailers' suggestions is that these detailed definitions raised the potential for under-inclusiveness or over-inclusiveness as to activities that constitute garment manufacturing, and would have locked in rigid definitions that could easily give way to rapid changes in industry practices. The proposed regulation is more consistent with the statutory definition of "garment manufacturing" than any of the rejected alternatives.

With respect to section 13657, garment worker advocates proposed that attorney's fees should be awarded to the employee if the employee rejects the findings of the investigator at the meet-and-confer conference and subsequently obtains any net recovery at a wage adjudication hearing, even if the net recovery is less than the amount found due by the investigator. On the other hand, contractor representatives suggested that the employee rejecting the meet-and-confer findings should not get any attorneys fees unless the adjudicative hearing results in an award to the employee greater than the amount found due by the investigator. The proposed regulation rejects both of these approaches, and instead ties an award of attorneys fees to whether the contractor and manufacturer unconditionally and immediately paid the full amount found due by the investigator at the meet-and-confer conference. If so, no attorneys fees would be awarded unless the employee obtained an award following the hearing for more than the amount assessed (and paid) as a result of the meet-and-confer; if not, attorney's fees would be awarded on any net recovery. The proposed regulation was chosen over the rejected alternatives because it is more consistent with the goal of encouraging the prompt payment of employee wage claims, and resolving these cases at the pre-hearing stage.

## ALTERNATIVES TO THE PROPOSED REGULATORY ACTION THAT WOULD LESSEN ANY ADVERSE IMPACT ON SMALL BUSINESS

The Commissioner initially determined that the proposed regulations did not result in any significant adverse impact on small businesses. However, based on comments from representatives of contractors and manufacturers, the Commissioner rethought this issue, and in April 2001 conducted a survey to determine whether the registration fee structure as originally proposed had an unduly adverse effect on small businesses. Based on the results of this survey, the Commissioner amended the proposal so as to lessen any adverse effect on smaller contractors and manufacturers. No other alternatives consistent with statutory prescriptions have been identified that would lessen any impact on small businesses.

## EVIDENCE SUPPORTING FINDING OF NO SIGNIFICANT ADVERSE ECONOMIC IMPACT ON ANY BUSINESS

The Commissioner determined that the only economic impact on any business stemming from these regulations is the cost of complying with new recordkeeping requirements at section 13659, namely, the requirement that contracts between garment manufacturers and contractors be in writing and contain certain specified information, and the requirement that contractors provide their employees with certain additional information on the already statutorily required itemized wage earnings and deduction statements each time these employees are paid. These recordkeeping requirements are rather simple and impose no significant burden on any business, and as such, the Commissioner concluded that these proposed regulations would have no significant adverse economic impact on any business.